Nos. 87-1979 and 88-127

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CHESAPEAKE AND OHIO RAILWAY COMPANY,
Petitioner,

v.

NANCY J. SCHWALB AND WILLIAM MCGLONE,
Respondents.

NORFOLK AND WESTERN RAILWAY COMPANY,
Petitioner,

v.

ROBERT T. GOODE, JR.,
Respondent.

On Writs of *Certiorari*
To The Supreme Court of Virginia

MOTION FOR LEAVE TO FILE AN AMICI CURIAE BRIEF AND BRIEF OF ASSOCIATION OF AMERICAN RAILROADS AND NATIONAL ASSOCIATION OF RAILROAD TRIAL COUNSEL AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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MOTION OF ASSOCIATION OF AMERICAN RAILROADS AND NATIONAL ASSOCIATION OF RAILROAD TRIAL COUNSEL FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

Pursuant to Rule 42 of the Rules of this Court, the Association of American Railroads and the National Association of Railroad Trial Counsel respectfully move for leave to file the attached *amici curiae* brief in these consolidated cases. Petitioner and respondents in No. 87-1979 have consented to the filing of this brief. Petitioner in No. 88-127 has likewise consented to its filing, but respondent therein indicated only that he will have no objection to this motion.

The decision of the Virginia Supreme Court below, in cases brought under the Federal Employers' Liability Act, 45 U.S.C. § 51, *et seq.*, reversed judgments of the state trial courts, which had dismissed the cases on the basis that their claims were subject to the exclusive jurisdiction of the Longshore and Harbor Workers' Compensation Act (33 U.S.C. § 901, *et seq.*), since respondents' duties involved maintenance and repair of structures and machinery utilized in loading bulk coal onto ships in navigable waters. As previously developed herein in the petitions for writs of *certiorari*, as well as the *amici curiae* briefs filed by these movants and the Solicitor General on behalf of the United States (which was filed at the request of this Court), the decision below is in direct conflict with the decisions of all six federal circuits which have considered the question, including the Fourth Circuit.

Mindful of considerations of nationwide uniformity as to the coverage of the LHWCA, as well as issues of federal supremacy (due to the fact that different results ensue, depending on whether a case is filed in state or federal court), these *amici curiae* submit that such coverage questions are susceptible to uniform resolution by application of a standard of "collective non-performance" of the particular duties of the injured worker as they relate to the ship-loading/unloading process. Such an approach was successfully utilized by this Court in resolving similar coverage questions which arose under the 1939 Amendments to the FELA, which expanded that Act's coverage for reasons much like those which prompted the expansion of coverage in the 1972 Amendments to the LHWCA.

The members of the Association of American Railroads constitute the vast majority of the nation's railroads which are sued under the FELA or the LHWCA, and have a direct interest in maintaining nationwide uniformity in decisions as to the scope of the exclusive coverage of the LHWCA, in order to properly determine under which of the Acts their injured employees must make claims for work-related injuries. The Members of the National Association of Railroad Trial Counsel, who are attorneys representing the various railroads, have a direct interest in the substantive law, strategy and tactics in cases brought under either Act, and have a direct interest in nationwide uniformity so as to enable them to adequately advise their railroad clients as to the proper handling of cases, depending upon which of the Acts is involved.[1]

Quite properly, the petitions herein were limited to arguing the propriety of the decision below, and did not undertake to develop a basis for the resolution of future cases which will involve other facts, or will involve future technological advances in ship-loading. These *amici curiae* believe the "collective non-performance" standard advanced in the attached Brief will be of assistance to the Court, not only in its resolution of the issues in these consolidated cases, but in developing a simple, objective and uniform standard of coverage of the LHWCA.

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[1] The marked disparity in procedures under the two Acts is discussed in Section III of the Brief Of Association Of American Railroads and National Association Of Railroad Trial Counsel As *Amici Curiae* In Support Of Petition in No. 87-1979, filed July 5, 1988.

Accordingly, the Association of American Railroads and National Association of Railroad Trial Counsel respectfully request leave to present their views herein.

Respectfully submitted,

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April 21, 1989

QUESTION PRESENTED

Whether, in determining if a worker qualifies as an "employee" engaged in maritime employment within the meaning of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et seq.*, the congressional intent for a "simple uniform standard of coverage" under the Act would be best achieved by an analysis as to whether the collective non-performance of his duties would slow, stop, or lessen the safety or efficiency of the ship-loading/unloading process?

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STATEMENT OF INTEREST OF AMICI CURIAE

The Association of American Railroads is a voluntary, unincorporated, non-profit trade organization,

headquartered in Washington, D.C. Its members constitute the vast majority of the nation's railroads. They operate approximately 85 percent of the line-haul mileage, produce approximately 93 percent of the freight revenues and employ approximately 90 percent of the railway work force in the United States, having in the aggregate nearly 250,000 employees who, if injured, are subject to the provisions of the Federal Employers' Liability Act, 45 U.S.C. § 51, *et seq.* (hereinafter "FELA"), unless their injuries are compensable under the Federal Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et seq.* (hereinafter "LHWCA"). The interest of the Association is to maintain nationwide uniformity in the determination as to which Act applies to those railroad employees injured while performing duties in connection with the loading and unloading of vessels.

The National Association of Railroad Trial Counsel is a voluntary, unincorporated non-profit organization, headquartered in Los Angeles, California. Its membership consists of more than 1,200 trial lawyers who represent all of the significant railroads operating throughout the United States. One of its principal objectives is to furnish railroad counsel with a forum for the study of legal problems associated with railroad personal injury cases, including those filed by employees under the FELA and the LHWCA, with particular interest in the substantive law and the strategy and tactics to be utilized therein. Another of its objectives is to enable its members to advise their railroad clients as to the proper handling of such injury cases depending upon which of the Acts is involved.

STATEMENT OF THE CASE

In these consolidated cases, the decision of the Virginia Supreme Court below in No. 87-1979 has been subsequently reported at 235 Va. 27, 365 S.E.2d 742 (1988). In No. 88-127, the Virginia court below later entered judgment based on the above decision. This brief, for ease of reference, will refer to the cases collectively as the decision below.

SUMMARY OF ARGUMENT

Notwithstanding the fact that the FELA expressly covers all claims by interstate railroad employees for work-related injury, if a claim is cognizable under the LHWCA, it *must* be filed under that later-enacted statute since that Act's coverage is "exclusive."[1]

The decision below by Virginia's highest court concerning the LHWCA's "status" requirement[2] is in obvious conflict with all of the many federal circuit decisions, thus defeating the congressional intent that "a simple, uniform standard of coverage" be applied.[3] This conflict is due to Virginia's view that longshore "status" can be achieved only if the employee actually

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[1] 33 U.S.C. § 905; *see Pennsylvania R. Co. v. O'Rourke*, 344 U.S. 334, *reh. denied*, 345 U.S. 913 (1953); *Nogueira v. New York, N.H. & H. R. Co.*, 281 U.S. 128 (1930).

[2] Congress expanded the coverage of the LHWCA in 1972 through the adoption of a "situs-status" approach, as extensively discussed in *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249 (1977). The decision below recognizes that the "situs" requirement has been met, as it is clear that mechanized coal loading facilities of the type involved herein constitute a part of an "adjoining pier, wharf, . . . or other adjoining area customarily used . . . in loading . . . a vessel." 33 U.S.C. § 903 (a).

[3] *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 83 (1979).

is "engaged in the handling of cargo", notwithstanding its recognition that respondents' failure to perform their duties would interrupt the ship-loading process.[4] The federal decisions, on the other hand, while using slightly different analyses, hold that the "status" requirement is satisfied where the employee's duties constitute a necessary or integral part of the loading process.

Amici curiae believe that this conflict can be resolved by adoption of a "collective non-performance" standard to determine whether the LHWCA's "status" requirement is met in individual cases: if non-performance of the work allocated to the employee and all others having the same duties would stop, slow, or lessen the safety or efficiency of the ship-loading/unloading process, the worker would be deemed an "employee" engaged in "maritime employment." This Court successfully utilized a similar standard in resolving coverage questions under the 1939 Amendments to the FELA, the coverage of which was expanded for much the same reasons which prompted the expansion of coverage accomplished by the 1972 Amendments to the LHWCA.

ARGUMENT

I. THE APPROACHES UTILIZED IN THE FEDERAL LHWCA DECISIONS, REJECTED BY THE COURT BELOW, ARE CONSISTENT WITH THE ACT AND ARE SIMILAR TO THE APPROACH UTILIZED BY THIS COURT IN CONNECTION WITH THE EXPANDED COVERAGE OF THE FELA

This Court has discussed the broad language of the 1972 LHWCA Amendments and accorded "an expan-

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[4] *Schwalb v. C. & O. Ry. Co.*, 365 S.E.2d 742, 743 (Va. 1988).

sive view of the extended coverage" thereof. *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. at 268. The various federal circuits, in line with this Court's liberal construction of the "status" requirement of the LHWCA, hold that workers who maintain or repair equipment necessary in ship-loading/unloading are within its coverage. Those decisions are based on the premise that such maintenance or repairs are either "an integral part of,"[5] "vital to,"[6] "essential to,"[7] or "essential and indispensable"[8] to the progressively mechanized process of ship-loading/unloading occasioned by modern technology.

In similar fashion, the federal circuits have addressed the related question of LHWCA coverage of different types of work done in shipbuilding and repair yards, finding coverage when a particular job was either "essential to . . . and was a necessary link in,"[9] "necessary to,"[10] or "significantly related to and

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[5] *Prolerized New England Co. v. Miller*, 691 F.2d 45, 47 (1st Cir. 1982); *Sea-Land Services, Inc. v. Director, Office of Workers' Compensation Programs*, 685 F.2d 1121, 1123 (9th Cir. 1982).

[6] *Harmon v. Baltimore & O. R.R.*, 741 F.2d 1398, 1404 (D.C. Cir. 1984); *Garvey Grain Co. v. Director, Office of Workers' Compensation Programs*, 639 F.2d 366, 370 (7th Cir. 1981).

[7] *Price v. Norfolk & Western Ry. Co.*, 618 F.2d 1059, 1061 (4th Cir. 1980).

[8] *Hullinghorst Industries, Inc. v. Carroll*, 650 F.2d 750, 755-56 (5th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982).

[9] *Graziano v. General Dynamics Corp.*, 663 F.2d 340, 343 (1st Cir. 1981).

[10] *Alabama Dry Dock & Shipbuilding Co. v. Kininess*, 554 F.2d 176, 178 (5th Cir.), *cert. denied*, 434 U.S. 903 (1977).

directly furthered"[11] the employer's shipbuilding and ship repair functions.

Amici curiae submit that the approaches taken by those federal decisions, and not the Virginia approach, correctly resolve the inquiry into the scope of coverage of the LHWCA, as amended. Their holdings generally comport with *Northeast Marine Terminal's* finding of coverage for a cargo checker whose work, although not involving actual handling of cargo, was nevertheless "an integral part of the unloading process as altered by the advent of containerization,"[12] whereas Virginia's approach (which turns on whether the employee was "actually engaged in the handling of cargo") does not. Moreover, their holdings are generally in accord with the "collective non-performance" standard utilized by this Court to determine similar coverage questions under the 1939 Amendments to the FELA, which has proved successful because it is a simple, direct, objective and common-sense test which achieves uniformity in application over a broad spectrum of jobs.

A. LHWCA COVERAGE WAS EXPANDED FOR REASONS SIMILAR TO THOSE WHICH PROMPTED EXPANSION OF FELA COVERAGE

As cogently discussed in *Northeast Marine Terminal*, LHWCA coverage initially was limited to "navigable waters", leaving those injured landward of the so-called "Jensen line" to state compensation remedies. Thus, LHWCA coverage sometimes depended

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[11] *Sanders v. Alabama Dry Dock & Shipbuilding Co.*, 841 F.2d 1085, 1088 (11th Cir., 1988).

[12] 432 U.S. at 271.

upon fortuitous and hypertechnical circumstances, such as whether the worker's body had been hurled into the water or remained on land,[13] or the location and status of the cargo at the time of injury (the so-called "point of rest" theory).[14] Congress enacted the 1972 Amendments to the LHWCA to meet the changes occasioned by modern technology, as well as to provide equal treatment to all workers engaged in the same job of ship-loading/unloading by moving the "Jensen line" landward.[15] By looking also to the duties of the employee, Congress obliterated the "point of rest" theory.[16] The 1972 Amendments based LHWCA coverage upon a dual "situs-status" test—by expanding the definition of "navigable waters" in 33 U.S.C. § 903 (a) to include adjoining piers, wharfs, terminals or other adjoining areas customarily used in ship-loading/unloading, and by broadening the definition of "employee" in 33 U.S.C. § 902 (3) to include anyone engaged in maritime employment, including longshoremen and harbor workers, subject to certain narrow express exceptions.[17]

Some thirty-two years previously, the Congress had expanded the FELA's coverage based upon much the same considerations. Prior to the 1939 Amendment to 45 U.S.C. § 51, the FELA provided that a "railroad, while engaged in commerce" between the states, "shall be liable in damages to any person suffering

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[13] *Northeast Marine Terminal*, 432 U.S. at 259.

[14] *Id.* at 274-75.

[15] *Id.* at 263.

[16] *Id.* at 277-79.

[17] *Id.* at 263-66.

injury while he is employed by such carrier in such commerce."[18] Litigation developed hypertechnicalities, such as the "moment of injury" and "new construction" doctrines, which resulted in some workers being allowed to proceed under the FELA, while others doing like work were left with state remedies. The 1939 Amendment to the FELA expanded its coverage to embrace those whose duties included the "furtherance of interstate or foreign commerce," or whose duties "in any way directly or closely and substantially affect such commerce."[19] In companion decisions, this Court found the purpose of the 1939 Amendment was "to obliterate fine distinctions as to coverage between employees who, for the purpose of this remedial legislation, should be treated alike,"[20] and to "cure the evils of hypertechnical distinctions which had developed in over 30 years of FELA litigation."[21]

Unquestionably, the 1939 Amendment to the FELA evinced a congressional purpose "to expand [that Act's] coverage substantially." *Reed v. Pennsylvania R. Co.*, 351 U.S. at 506. A similar "expanded view of coverage" to be afforded under the 1972 Amendments to the LHWCA was recognized in *Northeast Marine Terminal*, 432 U.S. at 268. In essence, the underlying reason for amending both statutes was to negate the hypertechnicalities which produced different results for employees doing similar work. To ac-

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[18] 45 U.S.C. § 51 (originally enacted as Act of April 22, 1908, ch. 149, § 1, 35 Stat. 65).

[19] 45 U.S.C. § 51 (as amended by Act of August 11, 1939, ch. 685, § 1, 53 Stat. 104).

[20] *Reed v. Pennsylvania R. Co.*, 351 U.S. 502, 505 (1956).

[21] *Southern Pacific Co. v. Gileo*, 351 U.S. 493, 499 (1956).

complish this, the amendments to both statutes focused upon the employee's *duties* in relation to the statutory criteria: whether the duties further or closely and directly affect interstate commerce under the FELA;[22] and whether they constitute "maritime employment" as a longshoreman or harbor worker so as to satisfy the "status" requirement under the LHWCA.[23]

As will be discussed below, the collective non-performance standard utilized by this Court in determining coverage questions under the 1939 Amendment to the FELA is remarkably similar to that utilized in the federal decisions in making the analogous determination under the LHWCA.

B. THE COLLECTIVE NON-PERFORMANCE STANDARD USED IN DETERMINING FELA COVERAGE IS READILY ADAPTABLE TO THE LHWCA

Because the determination of the question of "status" under the LHWCA requires an analysis of job duties as they relate to the statutory criteria of "maritime employment," the analysis utilized by this Court in making the analogous determination of coverage questions under the FELA's statutory criteria is readily adaptable thereto.

The standard by which specific coverage questions were resolved under the 1939 Amendments to the FELA was developed in the companion cases of *Gileo* and *Reed*. In *Gileo*, the Court approached the question by utilizing a collective non-performance analysis. The

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[22] *Id.* at 499.

[23] *Northeast Marine Terminal*, 432 U.S. at 264.

Court analyzed the issue as to whether "[f]ailure to perform their duties would preclude delivery to the railroad of cars . . . essential to its transportation needs" or "substantially impede the carrier's performance" in the case of one of the workers.[24] With respect to another worker, the Court reasoned that "since wheels which wear out cannot be repaired, they must be recast . . . . The operation itself is a vital link in the chain . . . ."[25] Similarly, in *Reed*, the Court analyzed the necessity of the work in question, not focusing on the individual employee, but instead assessing the effects of non-performance by all employees engaged in the same work: "[i]f all employees who perform petitioner's duties were removed from service, respondent could not conduct its operations without a change in its organizational system."[26]

While this Court has not promulgated a specific standard by which to determine "status" under the 1972 Amendments to the LHWCA, it has nevertheless indicated the basis for such a standard when it found coverage for one performing "an integral part" of the ship-loading/unloading process,[27] as well as another finding of coverage for a worker "responsible for some portion of that activity."[28] Those findings,

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[24] *Southern Pacific Co. v. Gileo*, 351 U.S. at 499.

[25] *Id.* at 500.

[26] 351 U.S. at 506-07.

[27] *Northeast Marine Terminal*, 432 U.S. at 271. The word "integral" is defined as "necessary for completeness; essential . . ." or "whole or complete" or "made up of parts forming a whole." Webster's New World Dictionary, 732 (2d College ed. 1986).

[28] "A worker responsible for some portion of that [longshoring]

coupled with this Court's recognition therein that Congress intended a "simple, uniform standard of coverage" commend the simple, direct and common-sense approach used in adjudicating FELA coverage questions.

For example, in the cases at bar, the work of clearing spilled coal by respondents Schwalb and McGlone, if not done, would soon result in an interruption to the loading process. Similarly, the retarder repairs being done by respondent Goode, if not performed, would result in an interruption to the loading process, as the coal cars must be properly stopped and positioned prior to their being lifted and rotated so as to drop the coal through the hopper and onto the conveyor belts. By application of the collective non-performance standard, the vital nature of their duties to the loading process becomes readily apparent.

Thus, *amici curiae* submit that the FELA's collective non-performance standard is readily adaptable to determine "status" questions under the LHWCA. The test is simple in application: whether non-performance of the duties of the employee and others doing the same work would result in the ship-loading/unloading process being impeded, stopped, or rendered less safe or efficient. If so, such work *a fortiori* would constitute a "vital link in the chain" or an "integral" and "indispensable" part of "longshoring" or "harborworking," and thus satisfy the "status" requirement adopted in the 1972 Amendments to the LHWCA.

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activity is as much an integral part of the process of loading or unloading a ship as a person who participates in the entire process." *P. C. Pfeiffer Co. v. Ford*, 444 U.S. at 82-83.

II. THE SUGGESTED STANDARD WOULD RESOLVE THE INTOLERABLE CONFLICT CREATED BELOW AND WOULD ACCOMMODATE CHANGES OCCASIONED BY ONGOING TECHNOLOGICAL ADVANCES

The decision below, by failing to accord Longshore status to employees whose work is necessary to the continued functioning of ship-loading equipment, is in direct conflict with the decisions of six federal circuits which have considered the question.[29] Whether viewed in the context of defeating the congressional intent for LHWCA uniformity recognized in *Pfeiffer*, or in the broader context of violating the principles underlying federal supremacy,[30] the conflict is intolerable under federal law.

The wisdom of the doctrines of uniformity and federal supremacy is clearly demonstrated where, as here, a state court deliberately chooses to put itself in conflict with its federal circuit court. Indeed, in refusing to apply the holding in *Price v. Norfolk & Western Ry. Co.*, the Virginia court candidly stated:

> The *Price* court reasoned that, because "the failure to paint would eventually lead to severe rusting that would halt the entire [loading] process" [citation omitted] the plaintiff was engaged in maritime employment and, consequently, "was an 'employee' within the meaning of the LHWCA which provides an exclusive remedy." [citation omitted.]

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[29] *See* fns. 5-8, *supra*.

[30] The Supremacy Clause "imposes upon state courts a constitutional duty 'to proceed in such manner that all the substantial rights of the parties under controlling federal law [are] protected.' [Citation omitted.]" *Felder v. Casey*, 486 U.S. ___, 108 S.Ct. 2302, 2313 (1988).

> *We cannot agree that Congress intended the 1972 amendments to have such pervasive and preclusive effects.*

365 S.E.2d at 744 (emphasis added). As a result, an injured employee will have different rights and remedies, depending solely upon whether his case is filed in a federal or a state court in Virginia—the very evil sought to be avoided under the LHWCA's concept of uniformity, and under the concept of federal supremacy. *Felder v. Casey*, 108 S.Ct. at 2313.

Not only is Virginia's view in direct conflict with the Fourth Circuit,[31] it stands alone in stark contrast with this Court's observation in *Northeast Marine Terminal* that the "language of the 1972 Amendments is broad and suggests ... an expanded view of its coverage,"[32] occasioned by "the advent of modern cargo-handling techniques."[33] Moreover, the Virginia view is belied by the 1984 LHWCA Amendments,[34] as to which Congress made clear that

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[31] Virginia's view is premised upon an obvious misapplication of this Court's decision in *Herb's Welding, Inc. v. Gray*, 470 U.S. 414 (1985) and the Ninth Circuit's decision in *Weyerhaeuser Co. v. Gilmore*, 528 F.2d 957 (9th Cir. 1975), *cert. denied*, 429 U.S. 868 (1976). In those cases, the workers were injured in areas not covered by the LHWCA, and the duties of each had no relation whatever to the ship-loading process. Moreover, the Virginia court totally ignored a post-*Weyerhaeuser* Ninth Circuit decision holding coverage for a worker whose duties involved repairing container cargo equipment. *Sea-Land Services, Inc. v. Director, Etc.*, 685 F.2d 1121.

[32] 432 U.S. at 268.

[33] *Id.* at 269.

[34] Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, § 2 (a), 98 Stat. 1639 (codified as amended at 33 U.S.C. § 902 (3)).

even non-cargo handling clerical workers were covered when some of their duties involve working in areas in which cargo is handled.[35]

We believe, however, that the collective non-performance standard discussed in Section I, *supra*, if adopted, would eliminate conflicts of the type involved here, by providing a simple, objective, practical and uniform test by which to determine questions of LHWCA "status" occasioned by on-going developments in technology.[36] The very simplicity of the standard allows the highest degree of flexibility in application, whether in resolving present questions (such as those occasioned by differences in union

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[35] "Workers . . . may be deemed to be engaged . . . in 'clerical type work', but [when] that work is done in the areas in which cargo is handled, not exclusively in a business office . . . the checker or clerk would remain within Longshore Act jurisdiction." H.R. Rep. No. 570, 98th Cong., 1st Sess. (1983), *reprinted in* 1984 U.S. Code Cong. & Ad. News 2734, 2737.

[36] In the federal decisions, the First and Fourth Circuits have resolved the "status" question by the express utilization of a non-performance analysis. *See Graziano v. General Dynamics Corp.*, 663 F.2d at 343; *Price v. Norfolk & Western Ry. Co.*, 618 F.2d at 1062. Although not utilized *eo nomine*, a non-performance concept is subsumed in the Seventh and D. C. Circuit analyses that the work was "vital" (*Harmon v. Baltimore & O. R.R.*, 741 F.2d at 1404; *Garvey Grain Company v. Director, Etc.*, 639 F.2d at 370), as well as in the Fifth Circuit's analysis that the work was "essential and indispensable" (*Hullinghorst Industries, Inc. v. Carroll*, 650 F.2d at 756). By contrast, the decisions of the Ninth and Eleventh Circuits involve a different approach, whereby they assess the nature of the maritime work of the employer, and consider whether the employee's duties are "integral" thereto, or "directly further" the same. *See Sea-Land Services, Inc. v. Director, Etc.*, 685 F.2d at 1124; *Sanders v. Alabama Dry Dock & Shipbuilding Co.*, 841 F.2d at 1088.

agreements, job descriptions, work rules, or methodology used in connection with the ship-loading/unloading process, which may differ from port-to-port, or from employer-to-employer or pier-to-pier in the same port), or in resolving future questions occasioned by technological advances which are presently unknown.

The startling gains in productivity achieved by technology were referred to in *Northeast Marine Terminal*.[37] Of course, economies of time and effort are not possible without the heavy-capacity machinery of different types required for the infinite varieties of cargo transported over the waters. While such machinery may replace a number of workers doing manual loading, yet other types of workers are needed to perform the preventive maintenance necessary for its continued and efficient operation, as well as the repairs necessary to restore it to service following a malfunction. Absent their work, modern ship-loading would halt.

Whatever the particular technology which may be involved (*e.g.*, that utilized in containerization of traditional cargo, rapid open or closed loading of bulk commodities, or safe loading of combustible fuels and gasses), the same principle applies—the speed, efficiency, and safety for which the technology was developed is defeated if the equipment is not maintained in a continuing state of good repair. Although the details of future technology are, of course, unpre-

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[37] The Court cited a study which showed that 42 men working a total of 546 man-hours could accomplish with containerization the same work done by 126 men working a total of 10,584 man-hours utilizing conventional methods. 432 U.S. at 270 n.31.

dictable, there is nothing which suggests there will be any change in the principle underlying the requirement that equipment be kept in a continuing state of good maintenance and repair. Whatever particular facts exist, or in the future may exist with respect to a given job and its relationship to the technology utilized in the shiploading process, the collective non-performance standard will provide a simple test by which to achieve uniformity in determinations as to whether various types of workers satisfy the LHWCA's "status" requirement.

Moreover, the 1984 LHWCA Amendments ensure that the collective non-performance standard would not be applied beyond the limits intended by Congress. First, those amendments did nothing to lessen the requirement that "situs" be satisfied. Second, as regards "status", the Congress further defined the term "employee" so as *not to include* certain individuals, such as those "employed exclusively to perform office clerical, secretarial, security, or data processing work,"[38] thus establishing the outer limits of "status."[39] Even as to these outer limits the legislative history is clear that the Congress intended them to be literally construed:

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[38] Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, § 2(a), 98 Stat. 1639 (codified as amended at 33 U.S.C. § 902 (3)).

[39] This provision, for example, would preclude LHWCA "status" for an office clerical worker such as the tracing file clerk involved in *Reed v. Pennsylvania R. Co.*, 351 U.S. 502, unless that job required the employee to perform a part of the work (*e.g.*, delivery of the requested tracings to the loading superintendent) in the area where cargo is handled, in which case the worker would qualify for LHWCA "status."

> The Committee intends that this exclusion be read very narrowly. First, the Committee intends that the word "exclusively" modify all four classifications of work presented. . . . The Committee firmly believes that the situation in which a worker may be covered at one time, and not covered at another, depending on the nature of the work which the worker is performing at the time of injury must be avoided since such a result would be enormously destabilizing, and would thus defeat one of the essential purposes of these amendments.
>
> Second, the Committee intends that the word "office" modify the word "clerical". Not all clerical work is intended to be excluded—merely that which is performed exclusively in a business office of the employing enterprise. Workers who may be classified as clerks or cargo checkers for example may be deemed to be engaged, at times, in "clerical" type work, but that work is done in the areas in which cargo is handled, not exclusively in a business office of the stevedore. In such circumstances, the checker or clerk would remain within Longshore Act jurisdiction.

H.R. Rep. No. 570, 98th Cong., 1st Sess. (1983), *reprinted in* 1984 U.S. Code Cong. & Ad. News 2734, 2736-37. Hence, with a clear declaration as to the outer limits of LHWCA coverage by the Congress, there is no danger that a collective non-performance standard to determine "status" would reach too far. Moreover, adoption of this standard would achieve that which this Court recognized was intended by the Congress in enacting the 1972 Amendments to the LHWCA: a "simple, uniform standard of coverage."

CONCLUSION

On the basis of the foregoing, *amici curiae* Association of American Railroads and National Association of Railroad Trial Counsel respectfully submit that the judgments of the Supreme Court of Virginia should be reversed, with directions to dismiss the complaints.

Respectfully submitted,

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